# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Rule involved | 2 |
| Statement | 2 |
| Argument | 4 |
| Conclusion | 7 |


## CITATIONS


Cases:

*Pitts* v. *United States*, 263 F. 2d 808, certiorari denied, 360 U.S. 919 — 5

*Taylor* v. *United States*, *Gallegos* v. *United States*, 285 F. 2d 700 — 2, 3, 4

*Wolcher* v. *United States*, 76 Sup. Ct. 254 — 5

*United States* v. *Johnson*, 327 U.S. 106 — 5

Statute, rule and regulation:

Universal Military Training and Service Act, 50 U.S.C. App. 462 — 2

Rule 33, F. R. Crim. P. — 2, 5

32 C.F.R. 1622.2 — 3




637214—62

# In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 646

MANUEL SANCHEZ GALLEGOS, JOHN FRANKLIN TAYLOR, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (2 R. 5–8;[1] Pet. App. 1–5) is not yet reported.

### JURISDICTION

The judgments of the court of appeals were entered on November 6, 1961 (2 R. 9–10; Pet. App. 6–7). On December 4, 1961, Mr. Justice Douglas entered an order extending the time for filing a petition for a writ of certiorari to and including January 5, 1962. The petition was filed on January 4, 1962.

[1] Volume 1 of the record consists of a separate part for each of the petitioners, Gallegos and Taylor, the parts being referred to herein as "1 R.G." and "1 R.T.".

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioners' motions for new trials on grounds of newly discovered evidence.

## RULE INVOLVED

Rule 33, F.R. Crim. P.:

> The court may grant a new trial to a defendant, if required in the interest of justice. * * * A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

## STATEMENT

Each petitioner was indicted on July 8, 1959, and thereafter convicted in the United States District Court for the Southern District of California for having failed in 1958 to obey an order to report for civilian work with the Los Angeles Department of Charities as a conscientious objector, in violation of the Universal Military Training and Service Act, 50 U.S.C. App. 462 (1 R.G. 15; 1 R.T. 14; 2 R. 5–7; *Taylor* v. *United States, Gallegos* v. *United States,* 285 F. 2d 700, 702 (C.A. 9)). Following imposition of sentences of five years, each petitioner appealed

from the judgment of conviction, contending, *inter alia,* that in violation of the law and the selective service regulations the government had failed to afford him a physical examination within 120 days of the order to report for induction. The court of appeals, on December 12, 1960, unanimously affirmed the convictions, rejecting this contention as inapplicable to persons ordered to report for civilian work in lieu of military service (1 R.G. 2; 1 R.T. 2; *Taylor* v. *United States, Gallegos* v. *United States, supra,* at 701–703).

Thereafter, on March 20 and 23, 1961 (1 R.G. 17; 1 R.T. 16), petitioners moved individually in the trial court under Rule 33 of the Federal Rules of Criminal Procedure for new trials based upon the ground of "newly discovered evidence." Both petitioners relied solely upon a letter of November 28, 1960 (1 R.G. 2, 13; 1 R.T. 2, 13), from the Chief of the Manpower Division of the Selective Service System to the Executive Secretary of the Central Committee for Conscientious Objectors, which advised that recently announced procedure for reexamination of persons classified "I–A and I–A–O" "also appl[y] to registrants who are classified in Class I–O."[2] In opposition to the motions, the government contested the nature of the letter as "evidence," and denied that it had any relevance to petitioners' offenses which were committed over two years before its writing. In addition, the government offered proof, based upon a letter of March 10, 1961, from the Director of the Selective Service System (ap-

[2] I–A–O registrants are conscientious objectors who are to serve with the armed forces; I–O registrants serve in civilian work (32 C.F.R. 1622.2).

pended to the brief in the court of appeals and attached as an Appendix, *infra*, p. 8) that the views expressed in the November 28, 1960, letter were erroneous (1 R.G. 9–10; 1 R.T. 9–10). In the March 10 letter the Director stated that his own prior instructions, that I–A and I–A–O registrants should be re-examined if they had been found qualified for induction more than one year prior to their scheduled inductions, had been erroneously modified by the letter of November 28, 1960, adding registrants in Class I–O.

The district court denied both motions (1 R.G. 17; 1 R.T. 16), and the court of appeals affirmed (2 R. 5–8; Pet. App. 1–5). The court of appeals held that the Manpower Chief's letter, first in existence two years after the offenses charged, was irrelevant with respect to proper procedures for pre-service examination at the earlier time and could not produce an acquittal (2 R. 7–8; Pet. App. 4–5). The court also held that, even assuming that the letter was found to qualify as "newly discovered evidence," the motions were addressed to the sound judicial discretion of the district court, the exercise of which, in absence of abuse not charged or shown, is not reviewable (*ibid.*; Pet. App. 4). The court of appeals also refused to pass a second time on petitioners' argument, previously heard and rejected (285 F. 2d 700), that the government's failure to grant them an examination within 120 days prior to the order to report for civilian work was a violation of the law (2 R. 8; Pet. App. 4–5).

ARGUMENT

1. It is well established that "[a] trial judge's order denying a motion for a new trial on an appraisal of newly discovered evidence should remain undisturbed 'except for most extraordinary circumstances.' *United States* v. *Johnson*, 327 U.S. 106, 111." *Wolcher* v. *United States*, 76 Sup. Ct. 254, 255. As declared by the court of appeals, there is clearly no basis here for finding an abuse of discretion by the trial court. Petitioners concede, in the single paragraph devoted by them to this issue (Pet. 8), that a motion for a new trial on the ground of newly discovered evidence must meet five requirements in order to qualify for the two-year period provided by Rule 33 (*Pitts* v. *United States*, 263 F. 2d 808, 810 (C.A. 9), certiorari denied, 360 U.S. 919):

> 1. Evidence must be newly discovered after the trial.
>
> 2. There must be diligence on part of movant.
>
> 3. The evidence must be more than merely cumulative or impeaching.
>
> 4. The evidence must be material to the issues involved.
>
> 5. The evidence must be such as would probably produce an acquittal.

Petitioners do not meet even one of these five requirements. We do not believe that it may be assumed, even *arguendo*, (1) that the Manpower Chief's erroneous letter of interpretation of law was "evidence"; (2) that petitioners showed proper diligence when they had failed to make—at a reasonable time—the inquiry to which that letter was a response; or (3)

that the letter was anything more than cumulative or impeaching with respect to the whole body of more formal and authoritative selective service regulations. But in any event, the trial court was manifestly exercising sound judicial discretion, since (4) an interpretation in a letter by an officer in the Selective Service System, enunciated on November 28, 1960, and corrected by the Director of the System on March 10, 1961, was not relevant "evidence" with respect to procedures with which petitioners were ordered in 1958 to enter upon required civilian work. Moreover, (5) there was no showing that the "evidence" would have produced an acquittal. The motions for a new trial indicated no way in which the November 28 letter could counter the specific language of the selective service regulations which required a physical examination 120 days before "induction." Reporting for civilian work outside the armed forces is not induction (2 R. 6; Pet. App. 2).

2. Petitioners also ask this Court to review the question which they raised unsuccessfully on direct appeal, *i.e.*, whether they should have been given a second physical examination within 120 days of the time they were ordered to report for civilian work. The court of appeals properly resolved this question against petitioners in affirming their convictions on direct review on December 12, 1960, rehearing denied, January 26, 1961 (285 F. 2d 700). Further review, by this Court, was not sought. Petitioners' attempt to use a motion for a new trial as a vehicle for still another appeal on this issue was properly rejected by the court below. Beside the fact that their objection

had already been twice heard and denied, it was unavailable under Rule 33 since the motions were not made within five days after trial.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
*Solicitor General.*
HERBERT J. MILLER, JR.,
*Assistant Attorney General.*
BEATRICE ROSENBERG,
J. F. BISHOP,
*Attorneys.*

FEBRUARY 1962.

# APPENDIX

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM

451 Indiana Avenue Northwest
Washington 25, D.C.

Address Reply To
The Director of Selective Service

MARCH 10, 1961.

AIR MAIL

STATE DIRECTOR OF SELECTIVE SERVICE,
*Old Post Office Building,*
*7th and K Streets,*
*Sacramento 14, California.*

DEAR COLONEL LEITCH:

There is enclosed, as you requested, a copy of the letter sent by Colonel Ingold to Mr. George Willoughby on November 28, 1960, relating to reexamination of registrants.

My instructions to State Directors, in my letter of September 30, 1960, expressed the viewpoint of National Headquarters that I–A and I–A–O registrants should be forwarded for reexamination if they had been found qualified for induction more than a year prior to their scheduled inductions. The purpose was to reduce the number of rejections when registrants reported for induction into the armed forces.

My letter referred only to I–A and I–A–O registrants who were about to be ordered for induction into the armed forces. I have not requested State Directors to reexamine I–O registrants whose physical

examinations were more than a year old, before assigning them to civilian work in lieu of induction.

Insofar as Colonel Ingold's letter of November 28, 1960 modified the plain language of my letter of September 30, 1960, his letter was in error and does not represent my view.

Sincerely yours,

LEWIS B. HERSHEY,
*Director.*

Enclosure.

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